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February 27, 2006

Lawrence H. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Advisory Opinion Request

Dear Mr. Norton:

We are writing on behalf of the Washington Democratic State Central Committee (the "Committee"), pursuant to 2 U.S.C. § 437f, to seek an advisory opinion from the Federal Election Commission on the proper allocation between the Committee and a federal candidate of the costs of a mass mailing, as defined in 2 U.S.C. § 431(23), to be paid for entirely with federal funds.

INTRODUCTION

The Committee is a state party that is registered as a political committee with the Commission. In connection with the 2006 election, the Committee proposes to prepare and send one or more mass mailings using the following criteria. Each mass mailing will contain a reference to a clearly identified federal candidate and a generic reference to other candidates of the party without clearly identifying them. The Committee may choose to refer to either a Senate candidate or a House candidate, but will clearly identify only one federal candidate per mass mailing. The Committee stipulates that it intends to coordinate, within the meaning of 2 U.S.C. § 441a(a)(7)(B), with the federal candidate who is to be clearly identified in a particular mass mailing. The Committee also stipulates that the mass mailing will expressly advocate the election of the clearly identified federal candidate and the other

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candidates of the party who are referenced generically in the mass mailing. The mass mailing will not contain any solicitation for a contribution or donation to the Committee, to any candidate, or to any other person. The Committee seeks confirmation that the Federal Election Campaign Act of 1971, as amended (the "Act") permits the Committee and the federal candidate who will be clearly identified in the mass mailing to each pay 50% of the mass mailing's costs.

LEGAL DISCUSSION

1. Both the Committee and the Federal Candidate Must Use Federal Funds to Pay for the Proposed Mass Mailing.

The Act clearly requires both state parties and federal candidates to use federal funds when paying for Federal election activity that refers to a clearly identified federal candidate. The Act requires that an amount expended or disbursed by a state party for Federal election activity "shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. § 441i(b). "Federal election activity" includes "a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." 2 U.S.C. § 431(20)(A)(iii). A "public communication" is defined to include a "mass mailing," which in turn is defined as "a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period." 2 U.S.C. § 431(22), (23).

Similarly, a federal candidate may not "spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act . . . ." 2 U.S.C. § 441i(e)(1)(A). Thus, there is no question that the Committee's proposed Federal election activity, which would expressly advocate the election of a clearly identified federal candidate, must be paid for by both the Committee and the federal candidate with entirely federal funds.

2. Based on the Commission's Treatment of Party Telephone Banks, It is a Permissible Interpretation of the Act for the Committee and the Federal Candidate to Share the Costs of the Proposed Mass Mailing Equally.

There is no statutory or regulatory provision directly on point to address the proper allocation of the costs of the proposed mass mailing between the Committee and the federal candidate who will be clearly identified in the mass mailing. The most analogous type of communication for which the Commission has provided guidance is a telephone bank. Based on the Commission's precedent in both the enforcement and regulatory contexts regarding telephone banks funded by a federal candidate and the candidate's party, a 50% allocation of the costs of the proposed mass mailing appears to be permissible under the Act.

The Commission first addressed this allocation question in the context of a presidential audit. During the Commission's mandatory audit of Bush-Cheney 2000, both the Audit Division and the Office of General Counsel concluded that a 50% allocation of phone bank costs between Bush-Cheney 2000 and its political party was "reasonable," even while acknowledging that this allocation method could be found nowhere in any existing regulation. Below is the relevant passage in a memorandum from the Office of General Counsel to the Audit Division, included in the Final Audit Report on Bush-Cheney 2000, Inc.:

> The Proposed Report notes that 15 Republican Party Committees and the General Committee paid $1,994, 631 for a phone bank that was a get-out-the-vote effort. [Vendor] conducted the phone bank the week prior to the general election. The callers requested that the individuals "get . . . families and friends . . . out . . . to vote for Governor George W. Bush and all of our great Republican team." The Party Committees paid 75% of the cost ($1,495,973) while the General Committee paid 25% ($498,658) of the cost of the solicitation effort . . . .
>
> The Audit staff analyzed the text of the phone bank script under 11 C.F.R. § 106.1(a)(1) and concluded that a 50% allocation was more appropriate. Section 106.1(a)(1) provides that expenditures, including in-kind contributions, made on behalf of more than one clearly identified federal candidate shall be attributed to each candidate according to the benefit reasonably expected to be derived. Although the Audit staff acknowledged that the only clearly identified candidate [footnote omitted] was Governor George W. Bush, they treated the reference to "our great Republican team" as another clearly identified candidate. Thus, the Audit staff determined that an allocation of 50% for the General Committee was reasonable given that the script was equally devoted in space and time to the candidate and the entity . . . .

The Commission's regulations do not provide for allocation of the type of expenditure at issue. Section 106.5(e) is not applicable because this regulation applies to party committees allocating the cost of exempt activities . . . . Similarly, Section 106.1 does not provide for allocation of the cost of the phone bank since it only applies to expenditures made on behalf of *more than one* clearly identified federal candidate, and "our great Republican team" is not a clearly identified candidate. 11 C.F.R. §§ 106.1(a) and (d). Significantly, the Commission considered alternative approaches to the definition of "clearly identified candidate" to include broader concepts. Explanation and Justification for 11 C.F.R. § 100.17; 60 *Fed. Reg.* 35292, 35293-94 (July 6, 1995). The definition would have been expanded to include candidates of a clearly identified political party and a clearly identified group of candidates (e.g. "Vote Pro-Life"). *Id.* However, the Commission declined, stating it would be difficult to determine the candidates in such a group. *Id.* Thus, the Commission specifically considered and declined to broaden its allocation provisions to encompass expenditures that refer to both specific individuals and a description of a group of candidates.

This raises the question of whether the expenditures at issue should be allocated at all. In the past, the Commission has permitted allocations that were not provided for in the regulations with respect to expenditures involving multiple purposes. [Footnote omitted.] In Advisory Opinion ("AO") 1998-6, the Albert Gore, Jr. for President Committee requested advice on whether a portion of the costs of a broadcast advertisement featuring the candidate discussing trade policy along with a visual listing of the words "Vote – Volunteer – Contribute" could be considered as an exempt fundraising expense pursuant to 11 C.F.R. § 100.8(b)(21). The Commission answered the question in the affirmative and agreed that a 50% allocation of the costs was reasonable. [Footnote omitted.]

In this matter, the phone bank communication appears to have had the multiple purpose of benefiting then-Governor Bush as well as "our great Republican team." This Office does not have information that suggests that the phone bank communication exclusively benefited then-Governor Bush. This Office is not aware of the identity or the number of candidates that were being referenced by the term "our great Republican team" in the phone bank script. However, it appears likely that this reference in the communication provided some benefit to the state party committees as such organizations are generally

> interested in promoting the election of all federal, state, and local candidates on the Republican ticket. Under the circumstances, this Office believes that it would be reasonable for the Commission to recognize the apparent multiple purposes for which the phone bank expenditures were made, and to accordingly permit allocation of the costs. Given that the script was equally devoted in space and time to then-Governor Bush and "our great Republican team," this Office believes it is reasonable to allocate the costs of the phone bank on a 50% basis. This allocation percentage is consistent with the Commission's treatment of other expenditures involving two purposes. See Advisory Opinion 1988-6.

Memorandum from Lawrence H. Norton to Robert J. Costa (Dec. 2, 2002) (Final Audit Report on Bush-Cheney 2000, Inc. and Bush-Cheney 2000 Compliance Committee, Inc.).

Subsequent to the issuance of that report, in 2003 the Commission promulgated regulations stating that a candidate may pay 50% of the costs of a party telephone bank that refers to the candidate, but with two important restrictions. First, the communication must refer not only to a clearly identified federal candidate, but also to other candidates of the federal candidate's party without clearly identifying them. Second, the communication may not contain a solicitation. *See* Final Rules and Explanation and Justification, Party Committee Telephone Banks; 68 *Fed. Reg.* 64517 (Nov. 14, 2003) and 11 C.F.R. § 106.8.

The Committee's proposed mass mailing would be consistent with these restrictions. As described above, each proposed mailing would refer to only one federal candidate and would include a generic reference to other candidates in the party without clearly identifying them. No solicitation of any kind would be included in the communication.

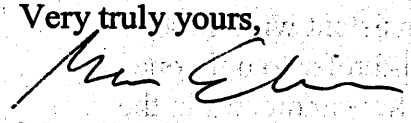
Importantly, the phone bank regulations were promulgated after the Bipartisan Campaign Reform Act of 2002 ("BCRA") went into effect. BCRA has a number of provisions that deal collectively with "public communications," which include both mass mailings and telephone banks. *See* 2 U.S.C. § 431(22), (23), and (24). There does not appear to be any legal or factual basis for concluding that a 50% allocation of the costs of a telephone bank is a permissible interpretation of BCRA, but the same allocation of a mass mailing would violate BCRA. In either case, BCRA would require both the party committee and the federal candidate to use entirely federal funds. *See* 2 U.S.C. § 441i(b) and (e).

During the rulemaking for 11 C.F.R. § 106.8, the Commission had the opportunity to address whether to extend the scope of its proposed rules to forms of public communication other than telephone banks. Initially, it sought comment on the following question: should the 50% rule apply only to telephone banks, or should it apply "to other media such as broadcast or print media"? Notice of Proposed Rulemaking, Party Committee Telephone Banks, 68 *Fed. Reg.* 52529, 52530 (Sept. 4, 2003). Ultimately, the Commission declined to address the issue one way or the other, stating in the Explanation and Justification that it had "decided to limit the scope of new section 106.8 to phone banks at this time because each type of communication presents different issues that need to be considered in further detail before establishing new rules." 68 *Fed. Reg.* at 64518. In light of the Commission's current rulemaking agenda, it seems unlikely that the Commission will address this matter more broadly in a rulemaking in time for the 2006 election. The Commission should therefore provide guidance on the specific activity that the Committee plans to undertake, leaving the question of a broader rulemaking to another day.

CONCLUSION

For these reasons, the Washington Democratic State Central Committee respectfully requests issuance of an advisory opinion, confirming that the costs of the mass mailing described in this request may be shared equally between the Committee and the federal candidate clearly identified in the proposed mass mailing.

Very truly yours,



Marc E. Elias
Caroline P. Goodson
Counsel to the Washington Democratic State Central Committee

cc: Chairman Michael E. Toner
Vice Chairman Robert D. Lenhard
Commissioner David M. Mason
Commissioner Hans A. von Spakovsky
Commissioner Steven T. Walther
Commissioner Ellen L. Weintraub